IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 26733 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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BHANDARI PRODUCTS, A PROPRIETORY CONCERN, - Petitioner(s)
Versus
GIRIRAJ ENTERPRISES. & 1 - Respondent(s)

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Appearance :
MR YJ JASANI for Petitioner(s) : 1,
MR YJ TRIVEDI for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 15/01/2007

ORAL JUDGMENT

M/s. Bhandari Products, petitioner, original defendant No. 1, has filed this petition under

Article 227 of the Constitution of India with a prayer that this Court may issue writ of certiorari or any other appropriate writ, order or direction quashing and setting aside the impugned judgement and order below Chamber Summons Application Exh. 55 in Regular Civil Suit No. 988 of 2005 passed by the learned Judge, Court No. 9, City Civil Court, Ahmedabad, on 27.11.2006 and further prayed that this Court may dismiss the amendment application at Exh. 55 in the Suit which has been filed by the original plaintiff.

1.1 This petition was filed on 18.12.2006. The matter was placed for hearing on 22.12.2006 and thereafter on 26.12.2006 and also on 27.12.2006. Thereafter, the matter has been placed for hearing today. I have heard Mr. Jasani, learned advocate for the petitioner. I have also heard Mr. Y.J. Trivedi, learned advocate, on behalf of the respondent No. 1.

2. The facts giving rise to this petition are as under:

2.1 M/s. Giriraj Enterprises, respondent No. 1, original plaintiff has filed Regular Civil Suit No. 988 of 2005 in the City Civil Court at Ahmedabad for passing off action under Section 27 of the Trade Marks Act, 1999 (hereinafter referred to as “the Act”) as well as infringement of Copyright Act particularly Section 51 of the Copyright Act, 1957). The plaintiff further prayed for account of profit and damage against Mr. Rajendra Maru, sole proprietor of M/s. Bhandari Products, defendant No. 1 in the main Suit. Defendant No. 1 is a registered Partnership Firm having its office at 132, 1st Floor, Ratnamani Complex, Nagarsheth Wando, Gheekanta, Ahmedabad. The Suit was filed on 8.6.2005.

2.1A In the suit filed for passing off action as well as infringement of Copyright Act the plaintiff has submitted in para 5 that the plaintiff has applied for registration of copyright and obtained copyright registration certificate in 2004. Hence the plaintiff is the exclusive proprietor of the said artwork/label and therefore the suit for infringement of copyright is maintainable at law.

2.1B In paragraph No. 6 of the Suit the plaintiff has submitted that the plaintiff has adopted and used the trademark/label containing and consisting trademark LAXMI with a device of goddess LAXMI for the last more than three decades and to acquire statutory rights with respect to the said mark, plaintiff has applied for registration of the said mark under the provisions of the Act on 8.5.1990. The plaintiff stated that the trademark registration application was accepted and advertised in the trademark journal and the same is opposed by defendant No. 1, the said opposition abandoned by the competent authority. The time to file review or appeal is expired. Hence the application is due for registration and plaintiff is likely to receive the certificate of registration within short time. However, the fact remains that on the date of filing of suit namely 8.6.1990 the plaintiff did not receive the registration of trademark and therefore the present suit has been filed under Section 27 of the Act namely for passing off action. In the said para

it is specifically stated as under:

> “The plaintiff further submits that the plaintiff craves leave to amend the plaint on issue of infringment of trademark as and when the plaintiff receives the registration certificate.”

2.1C The plaintiff also further submitted in the said suit that the plaintiff Giriraj Enterprise is first adopter and has first used the trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI openly, extensively, continuously and uninterrupted in the Indian markets and have acquired very good reputation and goodwill and thereby they have acquired common law right to restrain any other person, firm or company from using the said trademark/label containing and consisting trademark LAXMI with a device of goddess LAXMI and/or any mark which may be identical and/or deceptively similar for same goods and thereby enable them to pass off its goods as and for the goods of the plaintiff sold under the mark LAXMI. The

plaintiff relies on a copy of opposition filed by defendant No. 1 with separate list to prove the admission of deceptively similarity between the mark and use of identical mark, which is subsequent in adoption of use the said mark. It is further stated that the plaintiff is not only manufacturing and marketing the said goods under the said mark in India but plaintiff is exporting the products in foreign market. The plaintiff states that the plaintiff has spent considerable amount for advertisement and promotional expenses. In view of the other averments made in the suit, in para 21 the plaintiff has prayed for the following reliefs:

> “21(A) The defendants, their servants, agents, dealers, distributors, stockists, retailers etc. be restrained by an order of permanent injunction from manufacturing and marketing sta-isabgul being laxative products under the trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI and/or any other mark/label which is identical and/or

deceptively similar to the plaintiffs trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI thereby restrain them from committing an act of passing off.

21(B) The defendants, their servants, agents, dealers, distributors, and retailers be further restrained by an order of permanent injunction from printing, publishing and using the said trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI label having the same colour scheme and similar get up and arrangements of the plaintiff's trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI label and thereby restrain them from committing act of infringement of the plaintiff's copyright.”

4. Along with the Suit the plaintiff also filed Notice of Motion before the learned City Civil Judge

and the learned trial Judge issued notice on the same day i.e. on Exh. 5.

5. As the learned Judge did not give any ex-parte ad-interim injunction as prayed for by the plaintiffs, the plaintiffs filed Exh. 10 application on the same day stating that the learned Judge may give reasons as to why the learned Judge has not given ex-parte injunction as prayed for by the plaintiff. In view of the same, the learned Judge has given reasons for refusing the interim injunction on the same day on Exh. 10.

6. Being aggrieved by and dissatisfied with the order of the learned trial Judge refusing to grant interim injunction the plaintiff filed Appeal from Order No. 247 of 2005 before this Court. The matter was heard by my learned brother Hon'ble Mr. Justice S.R. Brahmbhatt and my learned brother after hearing passed the following order in paragraph Nos. 2 and 3:

> “2. Shri Tolia has urged that the trial Court has refused to record reasons and

decline to grant ex-parte interim injunction in a trade mark matter. He has placed reliance upon the decisions of the Hon'ble Supreme Court in AIR 2002 SC 275 and 2004(28) PTC 121 (SC) that in a matter of trade mark or copyright, the ex-parte injunction could be granted and learned trial Judge has not only not granted interim injunction but even refused to record reasons for not granting the ex-parte injunction, as prayed for.

3. In view of this, notice returnable on 28.6.2005. In the meantime, the trial Court is directed to decide Exh. 5 application as soon as possible and in any case, by the returnable date i.e. 28.6.2005. It is also necessary to mention that the defendant No. 1 is at liberty to move this Court prior to the returnable date in case of any difficulty. Direct service is permitted."

7. Pursuant to the said order, it appears that

though the defendant was served, however for the reasons which the defendant has subsequently stated, the defendant could not appear before the learned trial Judge. However, the learned trial Judge heard the Notice of Motion in absence of the representative of the defendant and granted the interim injunction by order dated 16.6.2005

8. Being aggrieved and dissatisfied with the said order of the learned trial Judge, the petitioner filed Appeal from Order No. 259 of 2005 before this Court. The said matter reached hearing before this Court and this Court (Coram: D.H. Waghela, J) passed order on 1.7.2005. In 3, my learned brother Mr. Justice Waghela has passed the following directions:

> (a) The appellant shall make an application under Order 39 Rule within a period of one week from today and the same shall be heard and disposed, as far as practicable, within two weeks of filing of the application.
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> (b) If the hearing of the application

proposed to be filed by the appellant is prolonged beyond two weeks and the delay is attributable to a particular party, the trial Court shall have the power to make appropriate orders granting or modifying the interim relief.

[c] Learned advocates for the parties shall co-operate in the earliest possible disposal of the application proposed to be filed by the appellant and shall not ask for any unnecessary adjournment.

(d) The trial Court shall hear and dispose the application proposed to be filed by the appellant on its own merits without being influenced by the earlier orders, including this order.

5. Upon the above understanding being recorded and the directions being issued, the appeal stands disposed. Direct service is permitted.”

9. In view the aforesaid development, the matter was pending before the trial judge for hearing Notice of Motion.

10. During the pendency of the proceedings, it appears that it has been stated that the plaintiff's application for for trade mark under No. 529272 dated 8.5.1990 is registered with the Registrar of Trade Marks and the Registrar of Trade Marks was pleased to issue Registration Certificate No. 387994 dated 14.6.2005. The said Registration Certificate is valid and is in existence. It was stated that the said registration is in respect of the trade mark effective from 8.5.1990 which is prior to the date of filing of the suit, hence the plaintiff is entitled to take infringement action against the defendant for use of identical and/or deceptively similar trademark as that of the plaintiff registered trademark device of LAXMI. The said certificate was also produced along with the amendment application. In view of the same, the plaintiff filed amendment application under Order 6 Rule 17 on 7.8.2006 and in the said amendment

application, the plaintiff has sought for amendment of the plaint by inserting para No. 6(a) after para No. 6 and by inserting prayer 21(AA) after prayer 21(A) in paragraph No. 21 in the plaint. Prayer 21(AA) reads as under:

> “21(AA) The defendants, their servants, agents, dealers, distributors, stockists, retailers, etc., be restrained by an order of permanent injunction from manufacturing and marketing sat-isabgul being laxative products under the trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI and/or any other mark/label which is identical and/or deceptively similar to the plaintiffs trademark/label containing and consisting trademark LAXMI with a device of Goddess LAXMI thereby, restrain them from committing an act of infringement of the registered trademark of the plaintiff.”

11. The defendant filed reply to the said

application on 1.9.2006 pointing out several objections before the trial Court. The said reply is on pages 71 to 87 i.e. Exh. 52 before the trial Court.

12. The learned trial Judge has heard the amendment application and the learned trial Judge passed judgement and order dated 27.11.2006 and in para 13 the learned trial Judge has given the following reasons and ultimately allowed the application for amendment of the Suit.

> “para 13 – I have heard L.A. Shri Jasani at length and his objections. However, in this case, it has been stated in the plaint at the time of institution of the Suit that the procedure of registration is pending and now, the plaintiff has availed it. So, the said facts the plaintiff requires to amend it under Order 6 Rule 17, the amendment is permissible at this stage. The legal objections of L.A. Shri Jasani that nature of the Suit will be changed in such

circumstance, the plaintiff will not entitle to get the relief as prayed for or in consequences, the Suit may be dismissed. However, the amendment application cannot be rejected or disallowed. So I pass the following order."

13. Being aggrieved and dissatisfied with the said judgement and order of the trial Court the original defendant has filed the present petition. Mr. Jasani, learned advocate for the petitioner has vehemently contended that the learned trial Judge has not properly considered the provisions of the Trade Mark particularly Section 28(3) read with Section 30(2)(e) of the Trade Marks Act, 1999.

14. He has also relied on the judgement of the Hon'ble Supreme Court in the case of RAJESH KUMAR AGGARWAL AND OTHERS VS. K.K. MODI AND OTHERS reported in (2006) 4 SCC 385 particularly paragraph 15 which reads as follows:

"para 15. The object of the rule is that

> the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side."

14.1 In support of the same, he has also relied on the judgement of the Delhi High Court in the case of P.M. DIESELS PRIVATE LIMITED VS. THUKRAL MECHANICAL WORKS reported in PTC (Suppl)(2) 863 (Del) decided by the Court (Coram: B.N. Kirpal, J (as he was then) on 19.1.1988 (AIR 1988 Delhi page 288).

15. On the other hand Mr. Y.J. Trivedi, learned Sr. advocate for the respondents has stated that in this case admittedly when the Suit was filed on 8.6.2005 the plaintiffs did not obtain registration under the provisions of the Trade Mark Act for the word "LAXMI". However, only subsequently on 14.6.2005 the the Registrar of Trade Mark has issued registration certificate in favour of the plaintiff

of trade mark “LAXMI”. He therefore submitted that the amendment application is filed on the basis of the events which have been happened subsequent to the Suit. He submitted that originally the Suit was filed for passing off action. As he has now obtained registration certificate under the provisions of the Trade Marks Act, he can also pray for further relief for infringement of trade mark in the plaint and the Court can take notice of changed circumstances and by reasons of subsequent developments the plaintiff is entitled to additional reliefs over and above the reliefs which were already prayed earlier in the suit. He has also relied on the reasoning of the learned trial Judge where the learned trial Judge has also stated that at the time of institution of the suit that the procedure of registration is pending and now, the plaintiff has availed it. So, the said facts the plaintiff require to amend it under Order 6 Rule 17, the amendment is permissible at this stage and on that ground the amendment application cannot be disallowed. The learned trial Judge has given cogent and convincing reasons and this Court under Article 227 of the Constitution of India will not

entertain the petition.

15.1 The learned counsel has also relied on the judgement of the Hon'ble Supreme Court in the case of SAMPATH KUMAR VS. AYYAKANNU AND ANOTHER reported in (2002) 7 SCC 559 particularly paragraph 7 on page 562. He has stated that in view of the judgement of the Hon'ble Supreme Court in the said case that the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the said case the trial Court did not allow amendment. The Hon'ble Supreme Court held that we failed to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the case, allowing the amendment would curtail multiplicity of legal proceedings.

15.2 In this case also the original suit filed was for passing off action. Once the plaintiff has

obtained registration, naturally the plaintiff can file independent suit for infringement of Trade Marks also. On this analogy the amendment application ought to have been allowed.

16. As regards the principle of amendment he has also relied on the judgement of the Hon'ble Supreme Court in the case of RAJESH KUMAR AGGARWAL & OTHERS VS. K.K. MODI AND OTHERS (supra) particularly where the Hon'ble Apex Court has held in para 15 that the object of the rule is that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties and the cause of action arose during the pendency of the suit and the proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed and once the plaintiff can file independent suit why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit. The learned counsel further

submitted that as per the said judgement the real controversy test is the basic and cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed. The present case falls within the ratio of the said judgement particularly in para 15 of the said judgement of the Hon'ble Supreme Court in the case of Rajesh Kumar Aggarwal Vs. K.K. Modi (supra) and in fact the said judgement helps the case of the plaintiff. He has also relied on paragraph Nos. 17 and 19 of the said judgement and also he has relied on paragraph No. 28 on page 398 which reads as under:

> Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporate by way of amendment are not to be adjudged at the stage of allowing prayer for

amendment, the order passed by the High Court is not sustainable in law as observed by this Court in Sampath Kumar vs. Aayakannu (2002) 7 SCC 559."

17. The learned counsel submitted that while the argument has entered into the merits of the matter it is not permissible while considering the amendment application and paragraph No. 28 of the said judgement of the Hon'ble Supreme Court in the case of Rajesh Kumar Aggarwal (supra) completely answers the contention of the learned counsel for the original defendant herein.

FINDINGS AND CONCLUSIONS:

18. I have considered the aforesaid facts of the case. In this case the suit was filed on 8.6.2005 on the ground of passing off a trade mark and infringement of copyright because on that day the plaintiff did not obtain registration of trade mark. However, as contended in the amendment application the Registrar of Trade Mark has granted registration

certificate of trade mark only on 14.6.2005 and therefore the present amendment can be allowed on the basis of the events which have happened subsequent to the suit. This Court, therefore, in the interest of justice has to take notice of subsequent events and grant appropriate relief because in the trade mark suit the relief of passing off as well as infringement are very vital reliefs to be prayed by the plaintiff.

19. This Court also refers to the judgement of the Hon'ble Supreme Court in the case of RAMESHWAR AND OTHERS VS. JOT RAM AND ANOTHER (1976) 1 SCC 194 particularly para 9 on page No. 200 which reads thus:

19.1 “The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its impotence to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more

efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts."

SUBSEQUENT EVENTS:

19.2 "The basic rule of every litigation is that the rights of the parties must be determined on the basis of the date of filing of the Suit.

19.3 The Court may, however, take notice of subsequent events in order to shorten litigation, to preserve, protect and safeguard rights of both the parties and to subserve the ends of justice. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court."

[(Re: paras 19.2 & 19.3 from C.P.C. - by Hon'ble Mr. Justice C.K. Thakkar (now judge of the Hon'ble Supreme Court), Volume 3, pages 482-483 Headnote no.39 Subsequent Events – Under Order VI Rule 17)]

20. In this case I also rely on the judgement of this Court in the case of Ganchi Mohmadbhai Kaduji Vs. State of Gujarat in Special Civil Application No. 7962 of 2004 delivered on 16.11.2006 where this Court has in para 18 also considered the judgement of the Hon'ble Supreme Court in the case of Rajesh Kumar Aggarwal Vs. K.K. Modi (supra) and also relied on another judgement of the Hon'ble Apex Court in the case of **Baldev Singh & Ors. Vs. Manohar Singh** and Anr. reported in 2006(6) SCC 498 particularly paragraph Nos. 8 and 9 of the said judgement and ultimately in paragraph Nos. **25 to 25.6** this Court considered the principles of Order VI Rule 17 of the CPC and the principles in connection with the amendment of pleadings. The said paragraphs are reproduced as under:

“25.1 The object of the Rule is that the courts should try the merits of the cases that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. *(P.H.Patil V.K.S.Patil, AIR 1957 SC 363).*

25.2 Ultimately, courts exist for doing justice between the parties and not for punishing them, and they are empowered to grant amendments of pleadings in the larger interest of doing full and complete justice to the parties. *(Ram Manohar Lal V.National Building Material Supply, (1969) 1 SCC 869.* Provisions for the amendment of pleadings are intended for promoting the ends of justice and not for defeating them.(*Ganesh Trading Co.Vs.Moji Ram, (1978) 2 SCC 91.”*

25.3 If the amendment is necessary to decide the “real controversy” between the parties, the amendment should be allowed even though the court may think that the party seeking the amendment will not be able to prove the amended

plea. This is the basic test which governs the courts' unchartered powers of amendment of pleadings. *No amendment should be allowed when it does not satisfy this cardinal test. (Per P.B.Mukharji, J. in Narsing Prosad Vs. Steel Products Ltd., AIR 1953 Cal 15(17).”*

25.4 Power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted.

25.5. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. *Dondapati Narayana Reddy V. Duggireddy (2001) 8 SCC 115.*

PRINCIPLES:

25.6 Provisions relating to amendment of pleadings must be liberally construed with a view to promote the ends of justice and not to defeat them. The purpose and object of the rules of pleadings is to decide the real controversy

between the parties and not to punish them for their mistakes, negligence or shortcomings. The exercise of discretionary power must be governed by judicial considerations and the wider the discretion, the greater the care and circumspection. The following principles should be borne in mind in dealing with applications for amendment of pleadings:

(i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) The proposed amendment should not alter and be a substitute for the cause of action on the basis of which the original lis was raised;

(iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

(iv) to (vi) xxxxxx

(vii) No party should suffer on account of

the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

(viii) xxxxxx

(ix) Error or mistake, which if not fraudulent, should not be made a ground for rejecting the application for amendments of pleadings.

[**Re: Para 25.6 Code of Civil Procedures, Vol.3, pages 473-474 by Hon'ble Mr. Justice C.K.THAKKER, (now Judge of the Hon'ble Supreme Court of India)].**

21. The basic rule of every litigation is that the rights of the parties must be determined on the basis of the date of filing of the Suit. He has further submitted that the Court may take notice of subsequent events in order to shorten litigation, to preserve, protect and safeguard rights of both the parties and to subserve the ends of justice. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and

complete justice to the before the Court.

22. The basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of the relief sought for by the plaintiff. In view of this fact, it is always open to the plaintiff to file a fresh suit. In view of this, this Court fails to understand, if it is permissible for the plaintiff to file an independent suit why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit by way of amendment. In the facts and circumstances of the present case allowing the amendment would curtail multiplicity of legal proceedings.

23. It is no doubt true that the trial Court has given reason for amendment but as far as this Court is concerned this Court confined only to certain aspect. In this case the Suit was filed on 8.6.2005 whereas the plaintiff has received registration subsequently. Therefore, on theory of subsequent event, the plaintiff is entitled to amendment of

plaint. In this regard this Court relies on the judgement of the Hon'ble Supreme Court in the case of Rameshwar Vs. Jot Ram (1976) 1 SCC 194

24. In view of this, I reject the writ petition filed by the petitioner and this being the Suit of 2005 this Court requests the learned trial Judge to decide the Notice of Motion after considering the contention of defendants particularly under Section 28 and 30 of the Trade Mark Act and also in accordance with law and he is entitled to raise all the contentions which he has raised in the petition. The learned trial Judge is requested to consider the judgements of the Hon'ble Supreme Court relied on by the learned counsel for the parties.

25. In the result the petition is rejected.

(K.M. MEHTA, J)

(pkn)